No. 89-1860

IN THE

Supreme Court of the United States

October Term, 1989

GLENN A. MAIN, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Question Presented for Review

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN EXCLUDING RELEVANT TESTIMONY FROM AN INDEPENDENT EXPERT WITNESS CALLED BY THE DEFENSE?

Parties

In neither the United States District Court for the Northern District of West Virginia nor the United States Court of Appeals for the Fourth Circuit was there a co-defendant or other appellant. Accordingly, there are no related appeals pending before this Court.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above matter on March 29, 1990.

Citations to Opinion Below

The Opinion of the Court of Appeals is unpublished, but is reproduced in Appendix A, *infra*; the Judgment Order is located at Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on March 29, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved

The statutory provision involved, 18 U.S.C. §1014, is set forth in Appendix C, *infra*.

Statement of the Case

Procedural History

The Petitioner was charged with three counts of making false statements on loan applications in violation of 18 U.S.C. §1014.

Trial began on March 14, 1989 before the Honorable William M. Kidd and a jury. On March 20, 1989, Judge Kidd declared a mistrial because the jury was unable to reach a verdict after two days of deliberations.

Retrial before Judge Kidd and a jury began on June 12, 1989 and concluded on June 14. The Petitioner was found guilty on all counts.

On July 17, 1989, the Petitioner was sentenced to two years' imprisonment and ordered to pay a fine of $5,000 on Count One. On Count Two, he was sentenced to a term of one year (to run consecutive to Count One) and ordered to pay a fine of $5,000. On Count Three, the court suspended a sentence of two years' (consecutive to Counts One and Two) in favor of probation for a period of five years. In addition, Petitioner was ordered to pay $36,238.07 in restitution.

Notice of Appeal was filed on July 20, 1989. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of sentence on March 29, 1990.

Factual History

The Petitioner is a certified public accountant and financial planner with offices in Elkins, West Virginia and Pittsburgh, Pennsylvania. He grew up in Elkins and attended high school and college there. He lived with his wife and children in Elkins until he moved to Pittsburgh in 1986.

On November 18, 1988, a grand jury sitting in the Northern District of West Virginia returned the present superseding indictment. Count One alleged that on October 14, 1985, the Petitioner knowingly made false statements on a loan application submitted to the Davis Trust Company for the purpose of influencing its action to approve a consolidation loan in the approximate amount of $211,000. It was alleged that the Petitioner falsely represented that he had notes and mortgages payable in the amount of $250,000 when in fact he had notes and mortgages payable in excess of $450,000; and that he had no intention of promptly notifying the bank of any changes in his financial condition which would tend to reduce his pecuniary responsibility (A. 7a).*

In Count Two of the indictment, it was alleged that the Petitioner knowingly made the same false statements to the Tygarts Valley National Bank for the purpose of influencing its action to approve an application for credit in the amount of $50,000 (A. 8a).

Count Three alleged that the Petitioner knowingly made material false statements in a financial statement submitted to Tygarts Valley National Bank on July 31, 1986 for the purpose of influencing its action to approve a loan in the amount of $20,000. It was further charged that the Petitioner falsely represented that he had cash on hand at the Davis Trust Company of $47,000, when in fact he had cash on hand of only $15,000; that he had notes and mortgages payable in excess of $334,600; that he was not a defendant in any suits or legal actions, when in fact he was a defendant in two civil suits; that his assets included a 1985 Volvo and a 1985 Mercedes with no others having an ownership interest in the

* References are to the appendix in the Fourth Circuit.

vehicles; that he had no contingent liabilities, when in fact he had contingent liabilities in excess of $1,000,000; and that he had no intention of notifying the bank of any significant adverse change in his financial condition (A. 9a).

The Petitioner testified on his own behalf at both of his trials and rebutted in detail each of the alleged false statements. His defense to the alleged false statements took two forms. As to some of the alleged false statements, the Petitioner explained why the statements were not false. For example, he testified that using an approved accounting method, the financial statements accurately reflected the market value of several of his real estate investments (A. 249a-256a), contrary to the government's allegation that the market values listed were false.

As to other alleged false statements, the Petitioner acknowledged that the statements were not accurate, but testified that the inaccuracies were not intentional, but were the result of mistake, inadvertence or negligence. For example, the July 31, 1986 financial statement, which was the subject matter of Count Three of the indictment, represented that the Petitioner had cash on hand at the Davis Trust Company of $47,000 when in fact he had cash on hand of only $15,000. This mistake occurred because the financial statement was prepared by Petitioner's employee Neal Skidmore. Skidmore simply copied the figure from a January 1986 financial statement (A. 281a) without first reviewing the figure with the Appellant (A. 376a-377a). Prior to submitting the statement to the bank, the Petitioner cursorily reviewed it, but finding the net worth figure to be conservatively correct, he assumed that the other figures were also correct (A. 289a).

As to the inaccuracies the Petitioner acknowledged, he supported his "lack of intent" defense with his testimony that he *understated* his net worth on each of the financial statements. In part, he understated his net worth because he didn't want people in his small community to know the extent of his wealth.

It was thus a major thrust of the defense that the Petitioner's understating of his net worth was inconsistent with the government's position that he made intentional misrepresentations and consistent with his "lack of intent" defense. To support this defense, the Petitioner retained an independent C.P.A. to review his financial records. The expert was prepared to testify at trial that, in his opinion, the Petitioner had indeed substantially understated his net worth on each of the financial statements. The trial court, however, based upon an objection from the government, refused to allow the witness to testify. Therefore, the only defense witness on this point was the Petitioner himself.

REASON FOR GRANTING THE WRIT

The district court committed reversible error in excluding relevant testimony from an independent expert witness called by the defense.

The Petitioner was charged with three counts of false statements on loan applications in violation of 18 U.S.C. §1014, which provides in pertinent part:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, . . . or loan, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

The essential elements of the offense are: (1) that the defendant made a false statement to a bank; (2) that he did so for the purpose of influencing the bank's action; (3) that the statement was false as to a material fact; and (4) that the defendant made the false statement knowingly. *United States v. Whaley,* 786 F.2d 1229 (4th Cir. 1986); *United States v. Bonnette,* 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied,* 455 U.S. 951, 102 S. Ct. 1456, 71 L.Ed.2d 666 (1982).

The crux of the defense was that none of the false statements were "knowingly" made, but, instead, were unintentionally, inadvertently or negligently made.[1] This theme was introduced during the opening statement (A. 38a, 39a) and was emphasized again during closing argument (A. 423a, 424a).

A major pillar of the "lack of intent" defense was the Petitioner's contention that he *understated* his net worth on the financial statements. It was his position that

[1] In fact, the court instructed the jury that an act is not done "knowingly" if the defendant acted ". . . through ignorance, mistake or accident."

understating his net worth was inconsistent with any notion that he "knowingly" made false statements.

To bolster his claim, Petitioner called a certified public accountant to testify as an expert witness. The prosecutor objected. During a sidebar conference, defense counsel proffered that he called the C.P.A. to testify that, based on documents he had reviewed in detail, the Petitioner had actually understated his net worth in the financial statements which were the subject matter of the indictment. At sidebar, defense counsel submitted to the court the following documents underpinning the expert's proffered testimony: Defendant's Exhibit 5, "Personal Balance Sheet, October 14, 1985"; Defendant's Exhibit 6, "Personal Balance Sheet, July 31, 1985"; Defendant's Exhibit 7, "Calculation of Increase in Net Worth" (A. 217a). Defense counsel further proffered that "the testimony of his accountant is essential to Mr. Main's defense to support his contention that he did not intentionally make any misrepresentations to the bank." (A. 227a).

The prosecutor objected because: (1) the defense did not turn over the documents until the day of trial, and (2) the testimony was not relevant (A. 216a).

The district court ruled that the expert testimony was inadmissible because the documents were not "divulged" to the prosecution until the day the witness was called (A. 232a, 233a, 235a). While conceding that he "most often could not make heads or tails out of what [accountants] say", the district court nevertheless determined that the expert's testimony was unbelievable, and he could not fathom that the Petitioner's net worth was understated in the financial statements (A. 233a-234a).

A.

The proffered testimony was relevant.

The district court committed reversible error by excluding this relevant expert testimony. The Federal Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R.E. 401.

Petitioner's argument was that both of the banks considered his net worth as the primary indicator of his ability to repay. In fact, the bank officers, called as witnesses by the government, testified that the Petitioner's net worth was the primary factor in determining his pecuniary responsibility (A. 130a-131a, 140a, 158a-159a, 165a-166a, 206a).[2] Those witnesses also rendered opinions as to the effect of certain loan transactions on the Petitioner's net worth and pecuniary responsibility (A. 103a, 107a, 138a-139a, 176a, 210a). Given the extensive testimony by government witnesses about the importance of net worth to their loan decisions, and their opinions as to the changes in the Petitioner's net worth *vis-a-vis* certain loan transactions, it was imperative for the Petitioner to have the testimony of an independent expert on this point. The expert's testimony would not only have strengthened the Petitioner's

[2] For example, the following testimony was elicited on cross-examination from George Sheets, the president and chief executive officer of Tygarts Valley National Bank:

> "Q. Would it be fair to say that the financial statement was reviewed in a cursory manner and approval was granted based upon the net worth reflected in the financial statement?
>
> "A. Yes, sir, it was; and based upon Mr. Main's status in the community being a C.P.A., why, we took his word for it was." (A. 166a).

testimony regarding the understatement of his net worth, but also would have *rebutted* the bank officers' opinion testimony that the Petitioner's net worth was lower than what he reported in his statements.

Additionally, the issue of net worth was directly related to the issue of Petitioner's intent, an issue within the sole province of the jury. *United States v. Goldstein*, 649 F.2d 799, 806 (10th Cir. 1981). For these reasons, the expert testimony was clearly relevant under F.R.E. 401.

Assuming the expert's testimony was relevant, the next question is whether there was any other basis for its exclusion. Under F.R.E. 402,

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."

Under F.R.E. 702, the proposed expert was qualified to render an opinion regarding worth:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The proposed expert had the education, knowledge, training and experience to review financial and accounting statements and give an opinion regarding an individual's net worth. Accountants for the Internal Revenue Service are routinely permitted to testify about changes in a taxpayer's net worth to prove income tax evasion prosecutions. *See, e.g., United States v. Grasso*, 629 F.2d 805 (2nd Cir. 1980).

In *United States v. Kelley*, 615 F.2d 378, 379-80 (5th Cir. 1980), a case involving 18 U.S.C. §1014, the Court of Appeals approved the testimony of bank officers, who gave opinions as to whether defendant's statements had the capacity to influence the bank.

United States v. Lueben, 812 F.2d 179 (5th Cir. 1987) was also a prosecution brought under 18 U.S.C. §1014. Lueben offered the testimony of an independent consultant and a certified financial examiner as an expert in examinations of savings and loan associations and in the making of real estate loans by savings and loan associations. Out of the presence of the jury, Lueben's expert testified that in making the type of commercial real estate loans involved in that case, a savings and loan association would consider only the value of the property securing the loan and nothing else. *Id.* at 183. The *Lueben* court inferred from the expert's testimony that the false financial statements and income tax returns submitted by Lueben were not "material" to the savings and loan associations' decisions to make the loans to Lueben. *Id.* The government objected to this testimony under F.R.E. 704, which provides:

> "(a) Except as provided in subdivison (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> "(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

The *Lueben* court concluded that Rule 704 forbids an expert to give an opinion on a conclusion of law. *Id.* at 184. The Court of Appeals then held that Lueben's attorney would be allowed to ask the expert at trial "whether the false statements in this case would have 'the capacity to influence' a loan officer of a savings and loan institution, not the legal question of whether the statements were 'material'." *Id.* at 184.

Thus, in both *Lueben* and *Kelley,* the courts allowed bank officers and experts to testify that a statement did not "have the capacity to influence" the bank's decision to make the loan. This kind of testimony goes directly to the element of materiality. *Id.* at 183, n. 3. If this opinion testimony is permitted under the federal rules, then *a fortiori,* the testimony of a defense expert on net worth is likewise permissible.

The expert's testimony also qualified for admission under F.R.E. 703, which provides:

> "The facts or data in the particular case which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

At trial, defense counsel offered three documents in support of the expert's testimony. These documents were the Petitioner's balance sheets and financial statements, and they contained the facts and data that accountants ordinarily rely upon to render an opinion. Furthermore, these documents were provided to the expert before trial and were reviewed by him in preparation for his testimony.

B.

The testimony should not have been excluded under Rule 16(b)(1)(A).

The government also alleged that defense counsel violated F.R.Cr.P. 16 (b)(1)(A) by not timely turning over the documents the Appellant intended to introduce through the expert. The prosecutor claimed that defense counsel had a pretrial obligation to turn over the documents because the prosecutor had filed a discovery motion entitled, "Request of the United States for Discovery and Inspection" under Rule 16. The district court excluded the expert testimony ostensibly on the ground of untimeliness.[3]

Rule 16(b) provides:

> "(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT
>
> "(1) Information Subject to Disclosure
>
> "(A) DOCUMENTS AND TANGIBLE OBJECTS.
> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, shall permit the government to inspect and copy of photograph books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial."

The rule specifically conditions the Defendant's duty to disclose upon the following: (a) the Defendant's request for disclosure of examinations and tests under

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[3] The district court stated "The timeliness of this proffer is the thing that troubles me the most." (A. 232a).

16(a)(1)(C) or (D); (2) the government's compliance with this request; and (3) the government's request for defense documents. In the case *sub judice*, the Appellant had no duty to disclose any documents pretrial because the first condition was not met. Defense counsel never filed a discovery motion pursuant to 16(a)(1)(C) or (D).[4] The Petitioner filed three pretrial motions: "Motion for Bill of Particulars", "Motion to Compel Government to Provide Defendant with Written Statement of Uncharged Misconduct Evidence" and "Motion for Disclosure of Impeachment and/or Exculpatory Evidence" (A. 11a-16a). None of these Motions were discovery motions[5] under Rule 16(a)(1)(C) or (D);

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[4] F.R.Cr.P. 16(a)(1)(C) and (D) provide:

> "(C) DOCUMENTS AND TANGIBLE OBJECTS. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial or were obtained from or belong to the defendant.
>
> "(D) REPORTS OF EXAMINATIONS AND TESTS. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results of reports of physical or mental examinations, and of scientific tests or experiment, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial."

[5] The "Motion for Bill of Particulars" was filed under Rule 7. The "Motion to Compel Government to Provide Defendant with Written Statement of Uncharged Misconduct Evidence" was made pursuant to the Fifth and Sixth Amendments to the Constitution. The "Motion for Disclosure of Impeachment and/or Exculpatory Evidence" was made pursuant to the Fifth Amendment.

therefore, the first condition was not met under Rule 16(b)(1)(A), and Petitioner had no reciprocal pretrial duty to turn over the documents. *United States v. Whiteside*, 391 F. Supp. 1385, 1389 (D. Del. 1975).[6]

Assuming, *arguendo*, that the defense had violated Rule 16(b), the district court's exclusion of the evidence was too drastic a sanction. *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979). Absent an abuse of discretion, the court's decision will not be disturbed on appeal. *United States v. Burkhalter*, 735 F.2d 1327 (11th Cir. 1984).

In the exercise of its discretion, the court must weigh several factors, and, if it decides that a sanction is appropriate, it "should impose the least severe sanction that will accomplish the desired result—prompt and full compliance with the court's discovery orders." *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982). Among the factors the court must consider are: (1) the reasons for the delay in providing the required discovery, *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985); (2) the prejudice to the other party, *Id.*; (3) the feasibility of curing the prejudice by granting a continuance or recess, *Id.*; and (4) the bad faith of the violating party, *United States v. Soto*, 711 F.2d 1558, n. 10 (11th Cir. 1983).

At trial, defense counsel explained that he had received the charts and documents from the expert only several days before the trial and only had time to review the documents with the expert on the day the expert was called to testify (A. 221a). Counsel, therefore, cannot be faulted for the delay in providing the government with

[6] The district court never *ordered* the pretrial disclosure of the underlying facts and data of the expert's opinion; therefore, F.R.E. 705 would not bar his testimony at trial.

the documents. Moreover, none of this evidence was new; rather, it had been presented at the first trial by the Defendant (A. 220a). Thus, the failure of the defense to provide the documents created no unfair surprise or prejudice to the government. Most importantly, the court could have cured the problem by granting a recess to give the prosecutor time to examine the documents. A recess during trial has been held sufficient to cure any prejudice to the defendant where the previous failure to disclose was inadvertent and the recess gave the defense time to prepare for cross-examination. *United States v. Fulton*, 549 F.2d 1325 (9th Cir. 1977). Since there was nothing surprising or unknown about the expert's testimony, and the prosecutor was very familiar with the case, a recess would have been a far more appropriate and fairer remedy.

In addition, the exclusion of relevant defense evidence for a discovery violation infringed upon the Petitioner's Sixth Amendment right to call witnesses. *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981). The *Davis* court opined that in the case of a defendant violating a discovery rule, "the exclusion of relevant, probative and otherwise admissible evidence is *an extreme sanction* that should be used only when justified by 'some overriding policy consideration.' " *Id.* (Emphasis added). In the instant case, there was no "overriding policy consideration" to justify the exclusion of this evidence.

As this Court observed in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an

> accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Id., at 19, 87 S. Ct. at 1923; *Lueben*, 812 F.2d at 185.

The district court's exclusion of this relevant testimony which would have supported the Petitioner's "lack of intent" defense was reversible error. The expert's testimony went to the existence of an element of the offenses and rebutted the testimony of the government's key witnesses. Had the testimony been allowed, the Petitioner might well have been acquitted.

Respectfully submitted,

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APPENDIX A

Judgment Order of Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 89-5426

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLENN A. MAIN, III,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. William M. Kidd, District Judge. (CR-88-156-K).

Argued: February 9, 1990 Decided: March 29, 1990

Before WIDENER and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: Stanton D. Levenson, Pittsburgh, Pennsylvania, for Appellant. David E. Godwin, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee. ON BRIEF: William A. Kolibash, United States Attorney, Robert H. McWilliams, Assistant United States Attorney, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

"PER CURIAM:

Glenn A. Main, III, is a financial planner who was convicted by a jury of three counts of submitting false statements to a federally insured bank in violation of 18 U.S.C. §1014, which prohibits "knowingly mak[ing] any false statement . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation." The falsity of his statements consisted primarily of failing to report large indebtedness.

The sole issue on appeal is whether the district court abused its discretion by excluding from evidence revised summaries of Main's finances, along with expert testimony to explain the summaries. Main argues that the summaries would have shown he actually understated his net worth on his loan documents, an act which he contends is inconsistent with the charge that he made false statements for the purpose of influencing three banks to lend him money.

The district court excluded the evidence because its offer was untimely, it lacked supporting documents, and it was of questionable relevance.

The financial summaries were offered after the close of the prosecution's case and without prior notice. The prosecution was not afforded a reasonable opportunity to examine the documents from which the summaries were derived, as required by Rule 1006 of the Federal Rules of Evidence. The prosecution estimated that it would need at least several days to review the underlying documents.

Furthermore, evidence of Main's net worth, insofar as it would have indicated his ability to repay or his lack of intent to defraud the banks, was irrelevant. *See United States v. Sabatino*, 485 F.2d 540, 544-45 (2nd Cir. 1973). Main's net worth, whatever it might have been, would not have modified the material false statements on his loan applications.

Given the marginal relevance of the financial summaries, and the way in which they were proffered, we find that the district court did not abuse its discretion in excluding them.

AFFIRMED"

APPENDIX B

Judgment Order

UNITED STATES DISTRICT COURT

Northern District of West Virginia

U.S. DISTRICT COURT
FILED AT CLARKSBURG
89 JUL 21 PM 2:01
NORTHERN DISTRICT OF WV
OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

v.

GLEN A. MAIN, III.

Case Number: 88-156-K

JUDGMENT IN A CRIMINAL CASE

Stanton D. Levenson
(Name and Address of Defendant) Attorney for Defendant

THE DEFENDANT ENTERD A PLEA OF:

[ ] guilty [ ] nolo contendare] as to count(s) _____, and [x] not guilty as to count(s) ONE, TWO and THREE.

THERE WAS A:

[[ ] finding [x] verdict] as to count(s) ONE, TWO and THREE.

THERE WAS A:

[[ ] finding [ ] verdict] of not guilty as to count(s) _____.
[ ] judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Filing false loan statements with federally insured banks, in violation of Title 18, United States Code, Section 1014.

IT IS THE JUDGMENT OF THIS COURT THAT:

As to Count One, the defendant is sentenced to the custody of the Attorney General for TWO (2) YEARS and fined FIVE THOUSAND ($5,000) DOLLARS.

As to Count Two, the defendant is sentenced to the custody of the Attorney General for ONE (1) YEAR and fined FIVE THOUSAND ($5,000) DOLLARS, said sentence to run consecutive to Count One.

As to Count Three, the defendant is sentenced to the custody of the Attorney General for TWO (2) YEARS, consecutive to the sentence imposed on Counts One and Two. It is further ORDERED that the sentence on Count Three is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to commence after he is released from custody on Counts One and Two. It is further ORDERED that the defendant pay restitution in the amount of $25,679.63 to Tygarts Valley National Bank and $10,558.44 to Davis Trust Company, said restitution to be paid before the fines.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation (illegible) on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $150.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) ONE, TWO and THREE as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[x] The Court orders commitment to the custody of the Attorney General and recommends:

> Commitment to (illegible) Correctional Institution or such medium to light security facility near to the defendant's residence. The defendant will be permitted to voluntarily surrender for service of said sentence. Such surrender is stayed pending resolution of defendant's appeal, and the defendant is ORDERED released on a Ten Thousand ($10,000) Dollar unsecured appeal bond.

July 17, 1989
Date of Imposition of Sentence

WILLIAM M. KIDD
Signature of Judicial Officer

William M. Kidd, U. S. District Judge
Name and Title of Judicial Officer

July 21, 1989
Date

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST:

DR. WALLY EDGELL
Clerk, U. S. District Court
Northern District of West Virginia
By: SHERIE N. THOMPSON
Deputy Clerk

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

APPENDIX C

Statute Involved

18 U.S.C. §1014 provides:

"§1014. Loan and credit applications generally; renewals and discounts; crop insurance

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal Land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."